No. 95-710

Supreme Court, U.S.
FILED
DEC 1
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In The

Supreme Court of the United States

October Term, 1995

MARGARET M. BAKER, et al.,

Petitioners,

v.

BANK OF BARTLETT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit Court of Appeals act correctly in affirming the granting of summary judgment in favor of the Respondent Banks?

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.1

Respondent Boatmen's Bank of Tennessee is a wholly owned subsidiary of Boatmen's Bancshares, Inc.

Respondent First American National Bank is a wholly owned subsidiary of First American Corporation.

Respondent Union Planters National Bank is a wholly owned subsidiary of Union Planters Corporation.

Respondent Leader Federal Bank for Savings is a wholly owned subsidiary of Leader Financial Corporation.

Respondent National Bank of Commerce is a wholly owned subsidiary of National Commerce Bancorporation.

Respondent Bank of Bartlett is a wholly owned subsidiary of West Tennessee Bancshares, Inc.

Respondent NationsBank of Tennessee, N.A. is a wholly owned subsidiary of NB Holdings Corporation. NB Holdings Corporation stock is owned by NationsBank Corporation, a publicly traded corporation. NationsBank of Tennessee, N.A., owns 100% of Commerce Place Company and Commerce Trading Corporation, neither of which is publicly traded.

Respondent Tri-State Bank of Memphis has no parent companies.

Respondent First Tennessee Bank National Association is a wholly owned subsidiary of First Tennessee National Corporation.

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 55 F. 3d 1166 (6th Cir. 1995), and is reprinted in Petitioners' Appendix at pages 2a to 9a. The decision of the United States District Court for the Western District of Tennessee is reprinted in Petitioners' Appendix at pages 10a to 19a.

STATUTE INVOLVED

Title 15. COMMERCE AND TRADE, CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE, 15 U.S.C. § 1.

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be

punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

COUNTERSTATEMENT OF THE CASE

Plaintiffs filed the instant lawsuit against nine banks doing business in the State of Tennessee (the "Banks"),[1] alleging that the Banks conspired or agreed, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to fix the amount of certain fees charged to Bank customers. At issue are the amounts the Banks charge customers for writing checks into overdraft ("NSF") and for depositing checks that are returned uncollected ("DIR").[2] The Banks

[1] This Joint Brief in Opposition to the Petition for Writ of Certiorari is filed on behalf of Respondents Bank of Bartlett; Boatmen's Bank of Tennessee; First American National Bank; First Tennessee Bank National Association; Leader Federal Bank for Savings; National Bank of Commerce; NationsBank of Tennessee, N.A.; Tri-State Bank of Memphis and Union Planters National Bank.

[2] In establishing all customer service charges (including NSF and DIR charges), the Banks considered, among other things, one or more factors of 12 C.F.R. § 7.8000 promulgated by the United States Office of the Comptroller of the Currency ("OCC"). This regulation permits banks throughout the national banking system to exercise their sound judgment in making business decisions to set service charges. In doing so, a bank may, but is not required to, consider several factors, including its costs plus a profit margin; deterrence of misuse by customers of banking services; enhancement of its competitive position in accord with its market strategy; and maintenance of the safety and soundness of the institution.

denied the existence of any conspiracy or agreement to fix or maintain such fees, and moved for summary judgment.

Plaintiffs admitted that they had no direct evidence of any agreement or conspiracy among the Banks to set prices but contended that the charges were so similar throughout the banking community as to amount to parallel pricing. *See, e.g.*, R. 159, Ex. 27, Deposition of Bradley Freiden, p. 32; Petitioners' Appendix, p. 4a. They argued that a sufficient inference of conspiracy existed to overcome summary judgment because the Banks (1) had a profit motive; (2) in large measure, did not consider cost as a factor in setting NSF and DIR fees; and (3) published and released to their customers and into the community their NSF and DIR prices. In opposition to the summary judgment motions, plaintiffs also submitted two "expert" affidavits. Petitioners' Appendix, pp. 20a-30a; 31a-33a. In large measure, the affiants merely stated that, based on the pleadings of the plaintiffs and their experience, it was their opinion that a conspiracy existed among the Banks. These opinions had no basis in fact, were completely unsupported by the record and actually ignored the undisputed facts placed into the record by the Banks.

The Banks denied that any conspiracy, explicit or tacit, existed among the Banks and supported their motions for summary judgment with affidavits setting forth the bases on which they made decisions in setting NSF and DIR fees. R. 140, 143, 144, 146, 147, 148, 150, 152, 153, 154, 155, 161. Each Bank established that its pricing decisions were made independently.

Based on the record before it, the district court granted summary judgment in favor of the Banks. Petitioners' Appendix, pp. 10a-19a. The Sixth Circuit affirmed, finding that the Petitioners had failed to present sufficient evidence to exclude the possibility that the Banks were pursuing legitimate independent business interests. Petitioners' Appendix, pp. 2a-9a.

REASONS WHY THE PETITION SHOULD BE DENIED

It is a familiar proposition that a Petition for a Writ of Certiorari "will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. In cases such as the present one, this normally requires that

> a United States court of appeal has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . [or] has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1(a), (c).

None of the issues raised in the Petition satisfy this Court's stringent requirements for granting a writ of certiorari.

I. THE DISTRICT COURT AND THE SIXTH CIRCUIT APPLIED THE CORRECT STANDARD FOR SUMMARY JUDGMENT AND SUMMARY JUDGMENT WAS PROPERLY ENTERED IN FAVOR OF THE BANKS.

The district court in this case properly entered (and the Sixth Circuit properly affirmed in a unanimous decision) summary judgment in favor of the Banks. Petitioners failed to come forward with any evidence that would tend to exclude the possibility that the Banks acted independently. No genuine issue of material fact existed in this case to preclude summary judgment in favor of the Banks, and nothing in the record would have allowed a reasonable juror to find in Petitioners' favor under the legal standard established by this Court's prior decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

The Petitioners argue that the lower courts ignored this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). The holding in *Eastman Kodak* is not applicable to the issues presented in this case. In *Eastman Kodak* the defendant company manufactured and sold photocopiers and micrographic equipment. The defendant also sold service and noncompatible replacement parts for such equipment and was accused of unlawfully tying the sale of service for its equipment to the sale of parts in violation of section 1 of the Sherman Act. Direct evidence was presented of the tying arrangement between the sale of service and parts. 504 U.S. at 456-58, 463, 477. Despite this direct evidence of anticompetitive behavior, the defendant in that case contended

that it lacked the market power necessary for a Sherman Act violation. In particular, the defendant alleged that its lack of market power in the primary copy equipment market precluded as a matter of law the possibility of market power in the derivative service and parts market. This Court disagreed with defendant's argument and found a genuine issue of material fact as to the defendant's market power in the service and parts aftermarket, affirming the denial of summary judgment. In the present case both the district court and the Sixth Circuit determined there was a lack of evidence to exclude the possibility that the Banks acted independently.

The *Eastman Kodak* case did not change the legal standard established by this Court in *Matsushita* and *Monsanto* for summary judgment in antitrust conspiracy cases. As the Court held in *Matsushita*, "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. . . . [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. . . . To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588 (quoting *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). The Sixth Circuit and the district court followed the above legal standard in the present case, and their decisions do not conflict in any way with decisions of this Court or other courts of appeals. Certiorari is therefore not available to Petitioners on that basis.

II. PETITIONERS PRIMARILY RAISE ONLY FACTUAL ISSUES THAT ARE INAPPROPRIATE FOR REVIEW BY CERTIORARI.

The only real question Petitioners raise is not a legal issue regarding the correct standard for summary judgment but a factual issue. In essence, Petitioners ask this Court to make a third review of the summary judgment record to see if it can find what two previous courts have been utterly unable to find – proof of a conspiracy to fix NSF and DIR fees. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari. *See, e.g., NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence. . . . "); *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."); *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.") Notwithstanding Petitioners' exaggerated references in their brief to the number of grains of sand in all the beaches of the world and the atoms in the universe, the present case is no more significant or important than any other summary judgment case that is decided on a factual record. Accordingly, certiorari should be denied.

CONCLUSION

The Petition does not present any questions that warrant review by this Court, and there are no "special and important reasons" for this Court to issue a writ of certiorari. For the foregoing reasons, Respondents submit that the Petition for Writ of Certiorari to the United States States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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